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Supreme Court of the United States,

OCTOBER TERM, 1901.

Nos. 18 and 24.

THE SOUTHERN PACIFIC RAILROAD COMPANY *ET AL., Appellants,*

vs.

THE UNITED STATES, *Appellee.*

THE UNITED STATES, *Appellant,*

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY *ET AL., Appellees.*

On the Motion by the United States to Open and Correct Judgment.

REPLY OF THE SOUTHERN PACIFIC RAILROAD COMPANY.

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Attorneys.

PRESS OF BYRON S. ADAMS.

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It is difficult to attempt to make clearer the plain, explicit opinion of the Court, delivered by Mr. Justice Brewer on January 6th inst.

No point is made in the motion by the United States that the matter in litigation, as well as the distinct question presented for consideration by the Court here, are not accurately stated, viz: 1st, whether the Southern Pacific Railroad Company took any title to these lands by virtue of the Act of 1866 or subsequent legislation; and 2d, do the prior decisions of this Court control the determination of this case?

Answering the first question in the affirmative, on the merits of the case, and the second in the negative, it was perfectly clear that, considering the Atlantic and Pacific Forfeiture Act of 1886, the United States and the Southern Pacific hold each an undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant made to both companies by the Act of 1866.

The court below assumed to decide every possible phase of a contest arising out of this grant and the overlaps, not only as to lands within overlapping place limits but the eight different possible classifications of overlaps of "primary" and "indemnity" limits, pertaining to the location. (Rec., p. 2650.)

The court below took it upon itself to decide all possible claims to any lands in any of these classes, upon the grounds that the Southern Pacific neither took nor could take either title or interest in any lands of the United States under the Act of 1866, because, as held, first: that by its charter it had no right to build the line from Mohave to the Needles, and so could take nothing until the Joint Resolution of 1870; meanwhile, the Atlantic and Pacific, having filed its maps of definite location, it took title to *all* the grant as of 1866; and, second, that every possible question to arise out of the conflict of these two grants, of 1866 and 1871, had been adjudicated by this Court in the prior decisions referred to in 146 and 168 U. S.

Now, in 146 U. S., 570, the lands in controversy were lands in the common place limits of the Atlantic and Pacific and the Southern Pacific under the Act of 1871. In 146 U. S., p. 615, the lands were within the place limits of the Southern Pacific, and the indemnity limits of the Atlantic and Pacific, under the same act, in which case the sole question was, whether the proviso in the grant of 1871, which is, in substance, that the grant to the Southern

Pacific shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, had such an effect that the indemnity lands of the Atlantic and Pacific where crossed by the Southern Pacific were exempted from the grant to the Southern Pacific so that the *title* to none of *these* indemnity lands passed or could pass to the Southern Pacific.

In both cases solely a question of *title* passing or not passing, by the grant itself was presented ; none of the incidents of the grants, such as the right to indemnity or its extent, or where or how it should be exercised, were involved in or necessary to the decision of either case ; nor were they decided.

In case in 168 U. S., it is stated in the third paragraph in the opinion that the principal contention of the United States is that the lands in dispute are in the same category in every respect with those in controversy in U. S. *vs.* S. P. R. R. Co., 146 U. S., 570, and U. S. *vs.* Colton Marble and Lime Co. and U. S. *vs.* S. P. R. R. Co., 146 U. S., 615, and that so far as the question of title is concerned, the judgments in those cases have conclusively determined * * * the essential facts upon which the Government rests its present claim."

So that the only question was whether certain maps of the Atlantic and Pacific had been *conclusively* adjudicated to be maps of definite location of the line of road of that company in California ; and if so, was the question of title to the lands in place limits of both grants as between the Southern Pacific under the Act of 1871 and the Atlantic and Pacific under the Act of 1866, conclusively determined ?

So that in these prior decisions questions of *title* and *title only* by the grant direct have been involved.

But, as stated, the court below, taking the broadest possible view, held that every question to arise out of these grants, not only of 1871, but of 1866 as well ; not only as to grant

and title direct thereunder, but all incidentals as to indemnity as well, had been decided by this Court, and gave the Government a decree for all lands within the Atlantic and Pacific grant, both in granted as well as indemnity limits, upon both grounds, viz: that the Southern Pacific had no authority to take the grant till the Joint Resolution of 1870, and also that all these questions were *res adjudicata*.

This Court, in the opinion before us, holds that the Southern Pacific took jointly with the Atlantic and Pacific under the Act of 1866, and that its claim is "of equal force with that of the Atlantic and Pacific."

That is to say, the Southern Pacific has a land grant with the ordinary legal incidents of selection, contest, indemnity, etc., etc., to be adjusted and administered under the law and in the Land Department under its proper regulations as adjustment may progress, the question of the validity and extent of the grant being settled.

As stated in the opinion, "It is also unnecessary to determine the rights of the Southern Pacific to lands outside the conflict," *i. e.*, outside the common granted limits.

This motion attacks this paragraph in the opinion; the motion assumes, in the first paragraph, that the Southern Pacific is not entitled to any indemnity whatever as to its grant under the Act of 1866, by asking the Court to direct the Circuit Court to enter a decree in favor of the Government for all lands outside the 20-mile (granted) limits of the Southern Pacific under the Act of 1866.

No such idea has hitherto been suggested, argued or considered in any of this litigation,

No right to specific land as indemnity under a railroad land grant can arise until adjustment is being had—a loss in place shown and a selection made of land, the status of which, at date of selection, makes it subject thereto.

To ask this Court to direct a decree below, that the

Southern Pacific has no right of indemnity, to decree that it shall assert no right hereafter to any lands in common indemnity limits of a grant first declared to be valid and effectual, is certainly novel.

The Southern Pacific is not asserting any *right* to any specific lands in indemnity limits until establishing loss and making selection ; its rights thereto will be presented in each individual case, and be determined by the status then existing. Its rights in such case should not, cannot be foreclosed by such an order as is asked here.

At this point we notice specially some of the points in the printed motion here.

The statement on page 6 "that the Government was entitled to a decree for these lands were practically conceded by counsel for the Southern Pacific Company and is conceded by the Court by reason of its prior adjudication" is as far from accuracy as the writer could possibly get.

These 600,000 acres of land are all indemnity lands as such, all are outside the place limits of the Atlantic and Pacific grant, and a large proportion appertain as indemnity to the grant of 1866, the validity of which this Court has just affirmed.

The statement that "counsel for the Southern Pacific have practically conceded that the Government was entitled to a decree for these lands" is best met by the counter statement, that counsel for the Southern Pacific have not only not so conceded, but they have uniformly and strenuously insisted precisely the contrary ; they have uniformly insisted that the Company had the usual right of indemnity selection in these lands, the regularity of which will be passed upon when they shall be made.

Moreover, this Court has not "conceded by reason of its prior adjudications that the Government was entitled to a decree for these lands," because this Court has never made

a decision upon the question of the right to indemnity in either of these grants on the part of the Southern Pacific.

We have shown above accurately just what questions have been decided in prior litigation by this Court—question of technical *title* as such, and that only.

In the pending case—clearly, expressly—the decision is as to *title* and *title* alone, under the grant of 1866.

By what warrant does counsel for the Government assume to say that this Court, in this opinion, decides that while affirming the validity of the grant of 1866 to us, that it also decides that we have no right to indemnity privileges provided for in the act, and appertaining to the grant? and that it *should be* decreed that the Southern Pacific should be forever barred from asserting any right or claim thereto?

The Court has made proper disposition of these lands, in its order which directs the Court "to dismiss the bill as to all other lands without prejudice to any future suit or action."

Of course the decree of the Court below had to be wholly reversed; it was erroneous on every question with which it undertook to deal.

The point presented on page 10 of the motion here needs but a passing notice.

No one has ever claimed for the Southern Pacific that it "had a pre-existing right or title to such indemnity lands without having an approved selection."

Certainly it will claim that it has a "right to select such indemnity lands to supply deficiencies within the place limits."

It has never claimed that such right "confers a present right or title to any specific tract of land until selection."

Whenever its claims to indemnity lands are presented to the proper forum, they will be passed on in precisely the manner outlined by the Court in the opinion before us, "the adjustment of the grant is properly to be had in the

Land Department, subject of course if necessay to further contests in the courts."

Counsel for the Government assume still, as did the Circuit Court of Appeals, that every possible question growing out of these grant has been conclusively determined.

This Court puts it clearly : that the decrees in the several cases "are conclusive of the title to the property involved in them, no matter what claims or rights either party may have had and failed to produce, but as to property which was not involved in those suits they are conclusive only as to the matters which were actually litigated and determined."

The motion should be overruled.

Respectfully submitted,

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